STATE OF MICHIGAN

COURT OF APPEALS

WARREN DROOMERS,[1]

Plaintiff-Appellee,

v

JOHN R. PARNELL, JOHN R. PARNELL & ASSOCIATES, and MUSILLI, BAUMGARDNER, WAGNER & PARNELL, P.C.,

Defendants-Appellants.

UNPUBLISHED
June 30, 2005

No. 253455
Oakland Circuit Court
LC No. 00-024779-CK

Before: Bandstra, P.J., and Fitzgerald and Meter, JJ.

PER CURIAM.

Defendants[2] appeal as of right from the trial court's order finding defendant John R. Parnell, as well as Ralph Musilli and Walter Baumgardner, nonparties who are shareholders in defendant Musilli, Baumgardner, Wagner & Parnell, P.C. (MBWP), in contempt of court and imposing thirty-day jail terms on each of them. We affirm the finding of contempt but remand for clarification regarding whether the trial court meant to impose sanctions for criminal or civil contempt.

MBWP served as legal counsel for an individual in her lawsuit against General Motors (GM).[3] The case was settled, and MBWP received a contingent fee of $1,057,909.80. On July

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[1] Warren Droomers died during the pendency of this case. In 2001, the trial court allowed a party substitution and ordered that the case caption be changed to read "Barbara Droomers, as Personal Representative of the Estate of Warren Droomers, deceased, Plaintiff, v. [defendants]." The ensuing lower court documents only sporadically employed the new case caption. For purposes of consistency, this opinion will employ the original caption.

[2] Ralph Musilli and Walter Baumgardner, nonparties who are shareholders in defendant Musilli, Baumgardner, Wagner & Parnell, P.C., concur with defendants' appellate brief.

[3] Defendant John R. Parnell filed a summary disposition motion and an accompanying affidavit in which he stated that he ceased doing business as the firm of "John R. Parnell & Associates" when, in 1993, he joined MBWP. He claimed that only MBWP – and not John R. Parnell, the (continued…)

25, 2000, plaintiff, an attorney, filed a one-count complaint alleging that he referred the GM case to defendants and that, because of a contractual agreement, they owed him a referral fee of $352,636.60. In paragraph fifteen of the complaint, plaintiff alleged that he assisted Parnell in litigating the GM case and that he was "therefore also entitled to *quantum meruit* for his valuable services," although plaintiff did not specify the monetary value of those services. MBWP denied the existence of a referral-fee agreement in the GM case and alleged that plaintiff never submitted any billing records to MBWP in connection with the GM case.

On August 12, 2002, plaintiff filed a first amended complaint in which he (1) alleged that defendants were contractually obligated to pay him referral fees for matters in addition to the GM case mentioned in the first complaint and (2) added a separate count labeled "Reasonable Value of Services (Quantum Meruit)." Subsequently, on December 4, 2002, plaintiff filed a "motion for relief under the Uniform Fraudulent Transfer Act" (UFTA), MCL 566.31 *et seq.* In this motion, plaintiff alleged that MBWP violated the UFTA by failing to set aside $352,636.60 for plaintiff after it received its contingent fee in the GM case. Plaintiff alleged that, instead of setting aside this money, MBWP "transferred this asset out of the corporation. Specifically, in December 1999, the . . . firm transferred $615,000 from the firm's trust account to the firm account, and, on information and belief, from there equally to the . . . shareholders." Plaintiff alleged that "[t]he transfers were transfers of the assets of a debtor intended to hinder or delay a creditor under [the UFTA], by making it difficult or impossible for [plaintiff] to collect on his claim." Plaintiff stated, "The [c]ourt should require the . . . [f]irm to pay into escrow the $352,636.60 transferred in violation of the UFTA, and enjoin any further transfer of corporate assets until such time as the escrow payment has been made." MBWP, in response, cited answers to interrogatories as well as deposition testimony and argued, in part, that plaintiff in fact had no fee-splitting agreement with MBWP.

The court granted plaintiff's UFTA motion on December 20, 2002, ordering MBWP to deposit $352,636.60 into an escrow account and to refrain from "transferring any firm assets out of the corporation until the $352,636.60 is paid into escrow[.]"

After a bench trial that occurred between April 29, 2003, and May 22, 2003, the trial court rejected plaintiff's breach of contract claim but found for plaintiff and against defendants[4] on the theory of quantum meruit, concluding that defendants owed plaintiff a total of $240,000, plus costs and statutory interest.

On October 10, 2003, plaintiff filed an "ex parte motion for order to show cause why [MBWP] and its agents, officers and attorneys Ralph Musilli, Walter Baumgardner and John

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individual, or John R. Parnell & Associates, the firm – was retained as counsel in the GM lawsuit and was paid a contingent fee. Eventually, the trial court agreed that John R. Parnell could not be held liable for breach of contract, but it refused to dismiss John R. Parnell & Associates with regard to the breach of contract claim. Moreover, both Parnell parties remained subject to liability for plaintiff's quantum meruit claim that was added in the first amended complaint.

[4] Despite the court's earlier conclusion that both Parnell parties remained subject to liability for plaintiff's quantum meruit claim, the court's order indicated that defendants MBWP and John R. Parnell, but not John R. Parnell & Associates, were liable for plaintiff's damages.

Parnell should not be held in contempt for failing to comply with the court's December 19, 2002 order." The trial court granted the motion and ordered the three individuals named in the motion to appear at a show-cause hearing. Subsequently, on October 24, 2003, MBWP filed a response in which it stated, among other things, that (1) it received the contingent fee payment three years before the trial court's escrow order; (2) it disbursed the funds in the ordinary course of business; (3) it had no reason to retain the money claimed by plaintiff because it did not find plaintiff's claim creditable; (4) the money in question was not available to be placed into escrow at the time of the court's escrow order; (5) the court's escrow order was "not intended to put the MBWP [f]irm out of business or to stop it from acting in the ordinary course of business"; and (6) plaintiff's original, contractual claim for a referral fee was rejected by the court and plaintiff recovered solely under the theory of quantum meruit, and "[t]he first time there was a dollar figure attached to the quantum meruit claim was in [the c]ourt's decision" following the bench trial."

On October 29, 2003, the court found MBWP in contempt of court and appointed a receiver for MBWP. The court stated that the receiver "will report to the court by December 15, 2003 all transfers and receipt of assets by [MBWP] from December 19, 2001 to the present." The court stated that it was withholding "a finding of contempt on the part of John Parnell, Ralph Musilli, and Walter Baumgardner pending the receiver's report."

On November 26, 2003, a hearing occurred regarding MBWP's objections to certain documents that they were asked to provide to the receiver. During this hearing, the court stated that it wanted "all parties to clearly understand the [c]ourt intends to totally, absolutely and without equivocation stand by" its order requiring that MBWP place money in an escrow account." It stated, "the [c]ourt will give until next month for those monies to be placed in there or everyone who has failed to comply with that order will be held in contempt." On December 4, 2003, the court issued orders finding Parnell, Musilli, and Baumgardner in contempt of court and ordering them to "appear on December 17, 2003 for a determination of the fines and the damages caused by [the] contempt." On December 5, 2003, plaintiff requested the following as fines and damages resulting from the contempt: criminal punishment, fines of $250 each, and compensation in the amount of $400,000. The hearing regarding fines and damages actually occurred on December 16, 2003. MBWP's attorney informed the court that Parnell had filed for bankruptcy and that "[t]he other two people, if the [c]ourt turns around and continues this order, will have no choice but to join him." The court ruled in part:

> It was just as though there was a flagrant disregard of the [c]ourt's orders and say [sic], come and get me if you want me, but I'm going to stand here and I'm going to thumb my nose at the [c]ourt's order.
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> There hasn't been any attempt at all. Basically, we're not going to pay them and let them come after us, that was the attitude. And basically the stick was, we're not going to pay. We're right, notwithstanding the [c]ourt's orders, and nothing's going to bring us to the table of resolution.
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> * * *

> [T]hese transfers have occurred and they have occurred without the [c]ourt – without the parties coming before the [c]ourt as a predicate, seeking relief from the order not to transfer and yet they went ahead and transferred.
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> There's never been an attempt, I'm satisfied, to comply with these [c]ourt orders.
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> I'm satisfied, therefore, that the contempt charge is, in fact, against all three individuals, for they are the shareholders and those orders from December 19th, 2002 and its progeny were all addressed to the firm as well as to the shareholders, and therefore, in finding them in contempt, the sanction will be 30 days in the Oakland County Jail for each one of them. Recognizing the fact that the bankruptcy has been filed, I'm asking Plaintiff to seek waiver . . . to execute [the instant] order.

A written order was entered that conformed to the court's oral ruling from the bench. It indicated that Parnell, Musilli, and Baumgardner were sentenced to thirty days in jail for "flagrantly disregarding the [c]ourt's December 19, 2002 order."

Defendants argue that the trial court erroneously imposed sanctions for criminal contempt (as opposed to civil contempt) without granting Parnell, Musilli, and Baumgardner proper due process safeguards. As noted in *In re Contempt of Auto Club Ins Ass'n*, 243 Mich App 697, 714; 624 NW2d 443 (2000):

> We review for abuse of discretion a trial court's decision to hold a party or individual in contempt. However, to the extent that our review in this case requires us to examine questions of law, such as the nature of the contempt orders and whether the contempt statute permitted the sanctions imposed in this case, review is de novo.

In *In re Contempt of Auto Club*, *id.* at 711-714, the Court discussed the natures of criminal and civil contempt. The Court stated:

> When a court seeks to compel a contemnor to comply with its order requiring or forbidding some particular act, the court may use the *coercive* sanctions permitted by civil contempt, including a fine of up to $250, a jail term of no more than thirty days[5] that expires when the contemnor purges the

[5] Although unnecessary to our decision, we note that the language of MCL 600.1715(1) suggests that imprisonment for what is known as civil or coercive contempt is not limited to thirty days, but rather may be indefinite in nature and expires when the contempt is purged or the contemnor shows he is unable to perform the act or duty.

contempt, and compensation to others who sustain losses because of the contemptuous conduct. Civil contempt ends when the contemnor complies with the court's order or is no longer able to do so and pays any fines or costs for the contempt proceedings. This ability to cure contempt, essentially making other sanctions unnecessary, is why the contemptuous behavior must persist at the time of the contempt hearing in order for the trial court to impose a coercive sanction.

This contempt hearing is, however, an interesting study in and of itself. When exercising its civil contempt power, the court acts as the factfinder, determines whether there was contempt under a preponderance of the evidence standard, and imposes sanctions if this standard is met. If the contemptuous behavior occurs in front of the court, i.e., it is "direct" contempt, there is no need for a separate hearing before the court imposes any proper sanctions because "all facts necessary to a finding of contempt are within the personal knowledge of the judge." If the contemptuous conduct occurs outside the court's direct view, i.e., it is "indirect" contempt, the court must hold a hearing to determine whether the alleged contemnor actually committed contempt. This hearing must follow the procedures established in MCR 3.606[6] and afford some measure of due process before the court can determine whether there is sufficient evidence of contempt to warrant sanctions.

* * *

Criminal contempt, which may also be classified as direct or indirect, serves a very different purpose from civil contempt in that it *punishes* the contemnor for past conduct that affronts the court's dignity. A court exercising its criminal contempt power is not attempting to force the contemnor to comply with an order. Therefore, it is impossible to purge this sort of contempt by acting in any particular manner.

Although criminal contempt is really only a "quasi-crime," criminal contempt proceedings encompass many of the same due process safeguards available to

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[6] MCR 3.606 states, in relevant part:

> **(A) Initiation of Proceeding.** For a contempt committed outside the immediate view and presence of the court, on a proper showing on ex parte motion supported by affidavits, the court shall either
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> (1) order the accused person to show cause, at a reasonable time specified in the order, why that person should not be punished for the alleged misconduct; or
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> (2) issue a bench warrant for the arrest of the person.

> defendants charged with traditional crimes. For instance, an alleged criminal contemnor is presumed innocent and is protected from compelled self-incrimination. The alleged contemnor must be allowed to offer a defense to the contempt charge, as well as adequate time in which to prepare the defense. Further, an alleged contemnor's "willful disregard or disobedience" of a court order and a clearly contemptuous act must be proved beyond a reasonable doubt. Like civil contempt, direct criminal contempt may be tried summarily, but indirect criminal contempt is subject to the specific procedures outlined in MCR 3. 606. If a court finds that there was contempt, it may impose a fine of up to $250, a jail term of up to thirty days, or both. The court may also require a criminal contemnor to pay compensation for damages caused by the contemptuous conduct. [*In re Contempt of Auto Club, supra* at 711-714 (emphases in original; internal citations omitted).]

Both civil and criminal attempt, although not explicitly labeled as such, are codified in MCL 600.1715:

> (1) Except as otherwise provided by law, punishment for contempt may be a fine of not more than $250.00, or imprisonment which, except in those cases where the commitment is for the omission to perform an act or duty which is still within the power of the person to perform shall not exceed 30 days, or both, in the discretion of the court.
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> (2) If the contempt consists of the omission to perform some act or duty which is still within the power of the person to perform, the imprisonment shall be terminated when the person performs the act or duty or no longer has the power to perform the act or duty which shall be specified in the order of commitment and pays the fine, costs, and expenses of the proceedings which shall be specified in the order of commitment.

Defendants argue that the court actually found Parnell, Musilli, and Baumgardner in criminal contempt without allowing them the due process safeguards discussed in *In re Contempt of Auto Club*. Frankly, it is unclear whether the court found the individuals in criminal or civil contempt. At the December 16, 2003, hearing, the court never explicitly stated whether it was finding the individuals in civil contempt or criminal contempt. However, during that hearing, plaintiff's attorney argued that civil contempt was at issue and that

> under civil contempt, the [c]ourt has authority to fine up to 250,000 dollars, no more, to imprison up to 30 days, and to find damages in addition . . . . [T]he purpose of the sanction in a civil contempt is to coerce or compel or it's remedial and that can be used as a means of awarding compensatory damages to the Plaintiff, but it is a civil contempt[.]

The court then stated, "The civil contempt proceedings institute [sic] to serve and enforce the orders of the [c]ourt," after which plaintiff's attorney responded, "That's correct."

The preceding colloquy was the only discussion concerning the nature of the contempt at issue, and it gives the impression that the court intended to impose sanctions for *civil* contempt.

However, the court went on to order that Parnell, Musilli, and Baumgardner serve defined jail terms of thirty days each, without stating that the individuals could avoid this jail sentence by purging the contempt, if they could somehow come up with the money at issue. The order gives the impression that the court was imposing sanctions for *criminal* contempt, i.e., that the court was *punishing* Parnell, Musilli, and Baumgardner as opposed to *coercing* them into complying with its earlier orders. See *In re Contempt of Auto Club, supra* at 711-713. From the existing record, it is simply unclear whether the court (1) intended to impose sanctions for criminal contempt or (2) intended to impose sanctions for civil contempt but simply omitted the fact that Parnell, Musilli, and Baumgardner could avoid jail time by "purging" the contempt. We have no choice but to remand this case to the trial court for clarification concerning which type of contempt it intended to impose.

It is highly likely that the court *did* in fact intend to impose sanctions for criminal contempt. Accordingly, we will address defendants' argument that such criminal sanctions were not appropriately imposed under the facts and procedures of this case. Addressing the issue now will obviate the need for us to retain jurisdiction and address the issue after the remand.

A person charged with criminal contempt is "entitled to be informed of the nature of the charge against him and to be given adequate opportunity to prepare his defense and to secure the existence of counsel." *In re Contempt of Rochlin*, 186 Mich App 639, 648-649; 465 NW2d 388 (1990). Moreover, he "is entitled to be informed not only whether the contempt proceedings filed against him are civil or criminal . . . but also the specific offenses with which he is charged." *Id.* at 649. A finding of criminal contempt must be based on proof beyond a reasonable doubt, *In re Contempt of Auto Club, supra* at 714, and the court's order to show cause must be based on "a proper showing on ex parte motion supported by affidavits." MCR 3.606; *In re Contempt of Auto Club, supra* at 714.

The proper procedures for criminal contempt were followed in this case. On October 10, 2003, plaintiff filed an "ex parte motion for order to show cause why defendant [MBWP] and its agents, officers and attorneys Ralph Musilli, Walter Baumgardner and John Parnell should not be held in contempt for failing to comply with the court's December 19, 2002 order." The motion was properly supported with documentary evidence. Moreover, the motion specifically alleged that defendants had never complied with the trial court's order concerning the paying of $352,636.60 into escrow. Additionally, in the accompanying brief, plaintiff stated, "The [c]ourt has the inherent authority to punish the violation of its orders through contempt proceedings." This was sufficient to warn defendants that plaintiff was potentially seeking a finding of criminal contempt.

The court granted plaintiff's motion on October 10, 2003, and ordered defendants to appear for a hearing on October 22, 2003, and to bring with them certain pieces of relevant documentary evidence. The record demonstrates that Parnell, Musilli, and Baumgardner were personally served on October 17, 2003, with the court's show-cause order. Defendants then filed a response in which they essentially indicated that complying with the escrow order was inappropriate because it would have put MBWP out of business. They did not complain about any procedural irregularities with regard to plaintiff's motion or the court's resultant show-cause order. A hearing then took place on October 29, 2003, during which defendants were given ample opportunity to demonstrate that Parnell, Musilli, and Baumgardner should not be held in contempt. Toward the end of the hearing, the court stated, in part:

> Here the . . . firm was committed to pay funds into escrow and enjoined from transferring any funds until the amount ordered was paid. This order and injunction was binding on Ralph Musilli, Walter Baumgardner, and John Parnell, because they were officers, shareholders, employe[d] as attorneys of the firm. The . . . firm did not pay the funds into escrow as ordered by the [c]ourt. . . . [T]hey never appeared before this [c]ourt requesting any minimizing of that order to transfer or any alternative to the transfer of funds, such as a bond. They failed to take steps to insure compliance with the [c]ourt's order. Therefore, at this time, I'm finding the firm in contempt, withholding the contempt citation against the three attorneys until such time as I have a final report from a receiver. . . .

After the noncompliance with the escrow order persisted, the court, on December 4, 2003, issued orders finding Parnell, Musilli, and Baumgardner in contempt of court and ordering them to "appear on December 17, 2003 for a determination of the fines and the damages caused by [the] contempt." The hearing actually occurred on December 16, 2003, and the court then issued the order containing the jail sentences.

These proceedings clearly provided Parnell, Musilli, and Baumgardner with the opportunity to defend themselves against the contempt proceedings. They had ample opportunity to present exculpatory evidence at the October 29, 2003, hearing and were given further time after that date to comply with the escrow order. Moreover, the court's finding of contempt was supported by proof beyond a reasonable doubt. Indeed, defendants *did not deny* that they failed to comply with the escrow order. They claim on appeal that they should not be punished for failing to comply with the order because it was impossible for them to have complied with it. However, and significantly, they failed to seek a modification of the order. As the trial court noted at the October 29, 2003, hearing, defendants "never appeared before [the c]ourt requesting any minimizing of that order to transfer or any alternative to the transfer of funds, such as a bond. They failed to take steps to insure compliance with the [c]ourt's order." Defendants simply disobeyed the court's order because they believed the order was not justified. Our legal system does not work in this fashion, and defendants have not established that the trial court acted improperly if it did indeed intend to impose criminal contempt sanctions on Parnell, Musilli, and Baumgardner.[7]

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[7] Defendants mention in their brief that "in cases of criminal contempt, the opposition party's attorney does not prosecute the matter." Defendants apparently believe that the matter should have been referred to the county prosecutor. However, their treatment of this issue is so cursory that we deem it waived for purposes of appeal. See *People v Mackle*, 241 Mich App 583, 604 n 4; 617 NW2d 339 (2000). Indeed, defendants fail to discuss the pertinent case law in a meaningful fashion, and they do not cite to the part of the lower court record in which they raised the issue. See MCR 7.212(C)(7) (facts stated in an appellant's brief "must be supported by specific page references to the transcript, the pleadings, or other document or paper filed with the trial court"). Defendants also appear to argue that the contempt proceedings should have been held before a different judge. Again, their briefing is deficient. Defendants merely refer to the text of a Michigan Court of Appeals case but fail to develop a meaningful argument with respect

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However, we remain unconvinced that the trial court actually *intended* to impose criminal sanctions as opposed to civil sanctions.[8] Accordingly, we remand this case for clarification of the court's order. If the court meant to impose sanctions for criminal contempt, then its order providing for determinate jail sentences was proper. If the court meant to impose sanctions for civil contempt, then the order must be reworded to allow for the possible "purging" of the contempt.

The finding of contempt is affirmed, but this case is remanded for clarification of the trial court's order. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ E. Thomas Fitzgerald
/s/ Patrick M. Meter

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to it. See *Palo Grp Foster Care, Inc v Michigan Dep't of Social Services*, 228 Mich App 140, 152; 577 NW2d 200 (1998). They also fail once again to cite the part of the lower court record in which they raised the issue. MCR 7.212(C)(7). Finally, we note that defendants contend that Parnell, Musilli, and Baumgardner should not have been held individually in contempt, because it was the firm that failed to comply with the court's order. This argument is without merit. See, generally, *People v Brown*, 239 Mich App 735, 739-740; 610 NW2d 234 (2000).

[8] Because the procedural protections applicable to civil contempt are not as stringent as those applicable to criminal contempt, our finding that criminal contempt sanctions were appropriate necessitates a finding that civil contempt sanctions were also appropriate. Moreover, defendants focus on criminal contempt in their appellate brief and do not explicitly make the argument that the procedural protections applicable to civil contempt were not followed in this case.